82-1416

No.

IN THE
SUPREME COURT
OF THE UNITED STATES

ANTHONY TASSONE
Petitioner

-vs-

UNITED STATES OF AMERICA
Respondent

COA NO.
80-1684

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT

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Petitioner, Anthony Tassone, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

QUESTIONS PRESENTED

A.

Whether Petitioner was denied a fair trial, in violation of the Fifth Amendment to the United States Constitution, where the Government offered testimony of Petitioner's alleged participation in a conspiracy to manipulate horse races, which testimony the Government knew, or should have known from public records in its hands, was perjurious.

B.

Whether Petitioner was denied a fair trial in violation of the Fifth Amendment to the United States Constitution and of 28 U.S.C. §455, where the Trial Judge refused on timely motion to recuse himself when it was revealed that he owned a substantial interest in real estate in common with the owners of the race tracks where the alleged manipulation of horse races occurred.

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OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit here sought to be reviewed has not yet been reported and is attached as Appendix A. The opinion of the United States District Court for the Eastern District of Michigan has not been reported and is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 13, 1982, and rehearing was denied December 27, 1982. This Petition for Certiorari is brought within ninety days of the latter date.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

28 U.S.C. §455 provides in pertinent part as follows:

> "§455. Disqualification of justice, judge or magistrate
>
> "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

STATEMENT OF THE CASE

Defendant Anthony Tassone was tried along with several co-defendants in the District Court for the Eastern District of Michigan under a seven-count indictment growing out of a highly-publicized alleged scheme to fix horse races at two race tracks in the Detroit area. He was convicted on May 12, 1980, under Count 2 of the indictment, alleging conspiracy to violate 18 USC §224, the sports bribery statute, and Counts 3 through 7, alleging violations as to particular races. The jury could not agree as to Count 1, alleging wire fraud in violation of 18 USC §1343, and a mistrial as to that Count was declared.

The crux of the Government's case was the testimony of one Anthony Ciulla, who was the chief architect of the alleged conspiracy but was granted immunity. Defendant Tassone's alleged involvement in the scheme was as a financial backer, and Ciulla's testimony as to a number of meetings with Defendant was the main evidence against him. (Trial Transcript, pp 1192-1195). Ciulla testified that the first such meeting took place in Detroit during June, 1973. When it offered this testimony, the Government had in its possession a "rap sheet" showing that Defendant had been arrested in New Jersey on May 23, 1973, and incarcerated in the Trenton State Prison on July 9. Nevertheless, the Government claims ignorance of the fact that Defendant was confined in the Mercer County Jail during the entire month of June and was thus incapable of meeting Ciulla in Detroit. (Government's Response to Defendant's Motion, pp 3-4). This fact appears in the jail records introduced by Defendant at trial and was verified by the testimony of Anthony Fucello, the jail warden, and of another jail official (T.T., pp 3218-3223; 3247). If the Government actually believed Ciulla's testimony that Defendant was in Detroit in June, 1973, it could only have done so by willfully refusing to investigate Defendant's whereabouts between his arrest and imprisonment.

The trial lasted two months, from March 13 to May 12, 1980. On the third day, after the jury had been impaneled but before it had been sworn, the trial judge announced that he owned 13.3% of an apartment building of which 50% was owned by the two individuals who owned the two race tracks allegedly corrupted by the fixing scheme. Defendant immediately moved that the judge recuse himself under 28 USC §455, which he refused to do. (T.T., pp 242; 270-273).

After trial Defendant renewed, unsuccessfully, its motion for recusal, and also moved to set aside the conviction on grounds of prosecutorial misconduct in offering the perjurious testimony of Anthony Ciulla. The Government responded that it had no knowledge of the perjury and that, even if perjury was used, Defendant had sufficient notice of the jail records to produce them as evidence.

After Defendant's post-trial motions were denied, appeal was taken to the United States Court of Appeals for the Sixth Circuit assigning as error the failure of the trial court to grant relief from prosecutorial misconduct, refusal of the court to recuse, and the court's method of polling the jury, the last error not being assigned in this Court. The Court of Appeals rejected Defendant's appeal on all points by an order filed October 13, 1982. As to the prosecutorial misconduct, it held (1) that the Government could not be held to have known that Defendant was in jail at the relevant time, despite possession of the "rap sheet", and (2) that there had been no prejudice because Defendant was not denied access to the information required to detect the perjury. (Order of the Court of Appeals, pp 4-5). As to the recusal, the court held that a "collateral business relationship", without a financial interest in the subject matter of the controversy or in a party, did not require recusal under 28 USC §455(a). (Order, p 8).

Defendant's motion for rehearing was denied on December 27, 1982.

ARGUMENT

I

Certiorari should be granted to resolve to issues regarding a prosecutor's duty to refrain from knowingly offering perjurious testimony, to wit:

A. THE ORDER OF THE COURT OF APPEALS CONFLICTED WITH A DECISION OF THE SECOND CIRCUIT IMPOSING THE BURDEN OF DETECTING AND ABORTING PERJURY UPON THE GOVERNMENT; AND

B. THE COURT OF APPEALS APPLIED A STANDARD OF PREJUDICE APPROPRIATE TO CONCEALMENT OF EXCULPATORY EVIDENCE RATHER THAN ONE APPROPRIATE TO KNOWING OFFER OF PERJURIOUS TESTIMONY, AND IN SO DOING, IT INVITED PROSECUTORIAL MISCONDUCT.

It has long been held that the right of an accused to due process is violated when the prosecution knowingly offers perjurious testimony on a material point. *Mooney* v *Holohan*, 294 US 103 (1935); *Pyle* v *Kansas*, 317 US 213 (1942); *Napue* v *Illinois*, 360 US 264 (1959); *Giglio* v *United States*, 405 US 150 (1972). The instant case presents two questions which have not been settled by this Court: the burden of detecting perjury and the relationship between offering perjurious testimony and suppressing the evidence of its perjury.

In the instant case, despite overwhelming evidence that Defandant could not have been in Detroit when Ciulla said he was, and despite the admitted fact that the Government had a "rap sheet" indicating that Defendant was in trouble with the law in a distant state at that time, the Court of Appeals permitted the Government to disclaim all knowledge of Defendant's incarceration and to indulge in totally unfounded speculation that Defendant might have been on

work release. Clearly, the court imposed no duty upon the Government to ascertain the truth of the testimony it proposed to offer even though it had information calling that testimony into question. This holding conflicts with the decision of the Second Circuit in *United States* v *Rosner*, 516 F2d 269 (2nd Cir 1975); *cert. denied*, 427 US 911 (1976), that the burden of detecting and aborting perjury rests on the Government. The holding of the Second Circuit, requiring at least that the Government act upon the information it has, offers accused persons a more effective protection against government misconduct without imposing unreasonable burdens upon the Government.

The paradigm case of an offer of perjurious testimony occurs when a witness who has entered an agreement with the prosecution denies the existence of the agreement on the witness stand, the defendant being unaware of the agreement until after the trial. *Napue* v *Illinois*, *supra; Giglio* v *U.S.*, *supra; Housden* v *United States*, 517 F2d 69 (4th Cir 1975); *DuBose* v *Lefevre*, 619 F2d 973 (2nd Cir 1980). In such cases, the question might be presented whether the prosecution's wrongdoing lay in presenting the testimony or in concealing the agreement from the defendant. The answer to that question is important to determining whether the wrongdoing requires reversal. If the primary wrong lies in the concealment, there need be no reversal if the defendant has knowledge of the facts needed to expose the perjury. If the primary wrong lies in the offer of testimony itself, however, reversal is required if the testimony was on a material point. *United States* v *Agurs*, 427 US 97, 104 (1976); *Smith* v *Phillips*, ___ U.S. ___, 102 S Ct 940, 947 (1982) (footnote).

In the instant case, the Court of Appeals reasoned that a defendant who has access to all the information possessed by the Government cannot obtain reversal if perjurious testimony is offered, holding in effect that there is no prejudice absent something akin to suppression. The effect of the court's holding is to permit a prosecutor to offer false

testimony, even as here on the facts of the alleged crime, without penalty, provided the defendant is offered a reasonable opportunity to expose the perjury. The corrupting effect such a rule would have on the fact-finding process can easily be imagined.

II

CERTIORARI SHOULD BE GRANTED TO DECLARE THAT WHERE A TRIAL JUDGE HAS A SUBSTANTIAL COMMUNITY OF INTEREST WITH PERSONS WHOSE INTERESTS ARE POTENTIALLY SEVERELY AFFECTED BY THE OUTCOME OF THE TRIAL, THE JUDGE SHOULD RECUSE HIMSELF UNDER 28 USC §455(a).

The general duty of a trial judge to recuse himself, established by 28 USC §455(a), was enacted in 1974, which enactment worked a major change in the law by abolishing the previous "duty to sit" if the judge was sure of his own capacity to be impartial and replacing the subjective judgment with an objective test focussing on the appearance of partiality. *S.C.A. Services* v *Morgan*, 557 F2d 110 (7th Cir 1977); *Blizard* v *Fuchette*, 601 F2d 1217 (1st Cir 1979); *Potashnick* v *Port City Construction Co*, 609 F2d 1101 (5th Cir 1980); *cert. denied*, 449 US 820 (1980); *Bradley* v *Milliken*, 620 F2d 1143 (6th Cir 1980); *cert. denied*, 449 US 870 (1980). Such a standard plainly requires the sensitive exercise of discretion, but the Court of Appeals in the instant case applied a standard permitting the exclusion from consideration of relationships with entities which are not formal parties to the action. The court relied on *United States* v *Ravich*, 421 F2d 1196 (2nd Cir 1970); *cert. denied*, 400 US 834 (1970), a pre-1974 case, and *United States* v *Sellers*, 566 F2d 884 (4th Cir 1977), holding that tenuous relationships with banks do not force recusal from the trial of persons accused of robbing those banks. Similarly, in *Virginia Electric and Power Co* v *Sun Shipbuilding and Dry Dock*, 539 F2d 357 (4th Cir 1976), it was held that a judge should not recuse himself solely because he was a customer

of a public utility involved in the action. These cases may well be correctly decided on their facts, but they should not be read to establish a rule that indirect relationships with the underlying fact situation do not force recusal. A better approach is that adopted by the Fifth Circuit in *Potashnick* v *Port City Const Co, supra*, where the court looked at the business relationship as a whole, without attempting to categorize it as direct or "collateral".

In the instant case, the trial judge had a substantial business investment in real estate partially owned and wholly managed by the owners of the two race tracks where the alleged fixing occurred. Neither the race tracks nor their owners were formal parties to the criminal proceedings. It must be obvious to every reasonable person, however, that a race track can be destroyed as a business if the integrity of its betting is called into question in the sort of proceeding involved in the instant case. A judge related financially to the owners of the track, however sincerely impartial he may be in his own mind, cannot but be suspected of having an interest in vindicating the track by uprooting the alleged conspiracy which threatens public confidence in it. Despite the "collateral" character of the judge's relationship, he should recuse himself.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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